

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

IN RE: SANTA FE NATURAL TOBACCO  
COMPANY MARKETING & SALES  
PRACTICES AND PRODUCTS LIABILITY  
LITIGATION

This Document Relates to All Cases

LEAD CASE NO. MD 16-2695 JB/LF

**NOTICE OF SUPPLEMENTAL  
AUTHORITY**

Plaintiffs notify the Court of *In Re: Kind LLC “Healthy and All Natural” Litigation*, \_\_\_\_ F.R.D.\_\_\_\_, 2021 WL 1132147 (S.D.N.Y. Mar. 24, 2021), where the court granted plaintiffs’ motion for class certification in a deceptive labeling case.

There, the court held plaintiffs met the implied, but not demanding, ascertainability requirement where the proposed classes included “*anyone* who purchased one of 39 KIND products that Plaintiffs allege contain false advertising.” *Id.*, at \*6. (emphasis added). The court rejected defendant’s concern that the class structure did not require class members to provide receipts as proof of purchase. The court held: “Imposing a receipt requirement would severely constrict consumer class actions where most consumers do not keep receipts because the purchase price is low and part of a minerun retail transaction.”

As for Rule 23(b)(3)’s requirements on materiality, the court noted “[t]he operative issue on class certification is whether the question of materiality predominates, not whether Plaintiffs’ answer is correct.” *Id.* at \*10 (rejecting defendant’s argument that plaintiffs must – but could not – show that the label would mislead a reasonable consumer). In other words, the question is whether materiality *can be* determined classwide. The court found that “[g]eneralized proof as to what message the packaging conveys will satisfy the inquiry.” *Id.*

The court also held that the plaintiffs' proposed damages models satisfied the proof of injury requirement even though the expert had yet to run the models. *Id.* at \*13. There, the plaintiff's expert proposed two methods, hedonic regression and conjoint analysis, to ascertain the premium paid as a result of the false advertising. The court noted that *Comcast* does not require experts to perform their analyses at the class certification stage. *Id.* at \*14. The court rejected defendant's additional concern that variations of the label meant that plaintiffs' damages model could not be coherent. The court reasoned that all purchasers were exposed to allegedly misleading advertising and therefore may have paid a premium, and that because the differences among the labels were slight, any difference in premium would be insignificant.

Dated: April 6, 2021

By /s/ Scott. P. Schlesinger

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 6, 2021, I served a copy of the foregoing on the Clerk of Court by CM/ECF, which will provide notification to all parties and counsel of record.

By: s/ Jeffrey L. Haberman  
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